

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
HELENA DIVISION

FILED  
AUG 17 2017  
Clerk, U.S. District Court  
District Of Montana  
Missoula

BENJAMIN KARL SMITH,

Plaintiff,

vs.

JEREMY MOODY, JOSHUA POSTMA,  
RYAN DURKIN, MIKE HEBERT,  
CORRECTIONAL OFFICER TROLLE,  
CORRECTIONAL OFFICER  
SEGOVIA,

Defendants.

CV 16-77-H-DLC-JTJ

ORDER

United States Magistrate Judge John Johnston entered his Findings and Recommendations on June 28, 2017 (Doc. 14), recommending dismissal of Plaintiff Benjamin Smith's ("Smith") Complaint. Smith has failed to timely object to the Findings and Recommendations, and, as a result, has waived his right to de novo review of the record. 28 U.S.C. § 636(b)(1)(C). This Court reviews for clear error those findings and recommendations to which no party objects. *See McDonnell Douglas Corp. v. Commodore Bus. Mach.*, Inc., 656 F.2d 1309, 1313 (9th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140, 149 (1985). Clear error exists if the Court is left with a "definite and firm conviction that a mistake has been committed." *United States v. Syrax*, 235 F.3d 422, 427 (9th Cir. 2000) (citations

omitted).

Having reviewed the Findings and Recommendations and Judge Johnston's Order dated May 19, 2017 (Doc. 13), the Court finds no clear error in Judge Johnston's conclusion that the Complaint fails to state a claim upon which relief may be granted and is subject to dismissal. Essentially, the verbal harassment Smith alleges in his Complaint, though highly offensive and inappropriate in any setting, does not rise to the level of a constitutional violation under either the Eighth or Fourteenth Amendments. *See Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996) (verbal harassment generally does not rise to a constitutional violation). Further, Smith's claims of retaliation, religious discrimination, and provoking violence are conclusory and fail to allege factual support. Judge Johnston allowed Smith to supplement these claims though an amended complaint but Smith failed to do so. Because Smith failed to supplement these claims they will be dismissed.

Accordingly, there being no clear error in the Findings and Recommendations, IT IS ORDERED that:

- (1) Judge Johnston's Findings and Recommendations (Doc. 14) is  
ADOPTED IN FULL.
- (2) This matter is DISMISSED WITH PREJUDICE for failure to  
state a claim.

(3) The Clerk of Court is directed to close this matter and enter judgment in favor of Defendants pursuant to Rule 58 of the Federal Rules of Civil Procedure.

(4) The Clerk of Court is directed to have the docket reflect that the Court certifies pursuant to Rule 24(a)(3)(A) of the Federal Rules of Appellate Procedure that any appeal of this decision would not be taken in good faith. No reasonable person could suppose an appeal would have merit. The record makes plain the Complaint lacks arguable substance in law or fact.

(5) The Clerk of Court is directed to have the docket reflect that this dismissal counts as a strike pursuant to 28 U.S.C. § 1915(g) because Smith failed to state a claim upon which relief may be granted.

Dated this 17<sup>th</sup> day of August, 2017.



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Dana L. Christensen, Chief Judge  
United States District Court